

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL
WITH PROOF
OF SERVICE

77-6097

To be argued by:
IRVING L. GOLOMB, ESQ.
Time requested: 15 minutes

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

8-9-77



SECURITIES AND EXCHANGE COMMISSION,

-against-

CANADIAN JAVELIN LIMITED,

Defendant-Petitioner-Appellant,

JOHN C. DOYLE,

Defendant,

WILLIAM M. WISMER,

Defendant-Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-PETITIONER-APPELLANT,
CANADIAN JAVELIN LIMITED

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-against-	:
CANADIAN JAVELIN LIMITED,	:
Defendant-Petitioner-Appellant	:
JOHN C. DOYLE,	:
Defendant	:
WILLIAM M. WISMER,	:
Defendant-Respondent-Appellee.	:

-----X

THE APPEAL

Appellant Canadian Javelin Limited ("Javelin") appeals from the order of Judge Lloyd F. McMahon in the United States District Court, Southern District of New York, dated May 13, 1977, which denied Javelin's motion to punish appellee Wismer and a group of other alleged contemnors for contempt, for violating a consent injunction dated July 17, 1974. That injunction had provided

that the District Court retained jurisdiction for purposes of its enforcement.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did appellant, Canadian Javelin Limited, party to a Consent Judgment, have standing to complain via a contempt application, of the violation of that Judgment by appellee, William M. Wismer (and other alleged contemnors), formerly the President and a Director of appellant at the time the Judgment was entered, who (a) had executed simultaneous mutual and reciprocal stipulations with appellant, on the basis of which the Judgment was entered, and (b) continues as President of a related company?

2. Did the District Court err in denying contempt in the face of a blatant violation of the Judgment as expressly found by the District Court?

3. Did the District Court misapply against appellant instead of against its principal shareholder the theory of estoppel, thus punishing it instead of him by depriving it of standing?

4. Could appellee Wismer, by self-dealing issuance of stock to another affiliate of appellant, of which he was

in control, insulate himself from the injunction provisions of the Judgment by purportedly converting a subsidiary of appellant into an affiliate?

STATEMENT OF THE CASE

Upon the hearing of the motion, the Court characterized the acts complained of as "a blatant violation of the decree" (A 163). Nevertheless, it denied contempt on the grounds that Javelin lacked standing. The Court's decision reads simply: "Following oral argument, motion denied for lack of standing. Cf The American Society of Composers, Authors and Publishers, 341 F. 2d 1003 (2d Cir. 1965). So ordered".

The Parties and Alleged Contemnors

Appellee Wismer and John C. Doyle were co-defendants with appellant Javelin in the injunction action brought by appellee, Securities and Exchange Commission ("SEC") which culminated in the July 17, 1974 injunction. Appellee Wismer was then President of Javelin (A31).

Doyle was and is the largest single shareholder in Javelin, with approximately 18% of its shares. Wismer is presently the President of Bison Petroleum & Minerals Limited

of which, on February 21, 1977, Javelin owned 61.2% of the outstanding shares. The other alleged contemnors, except Bothwell, were formerly Directors of Javelin during 1974 (in the case of Messrs. Ayre, Rozzini, Shir E and Smith). Wylie was elected as Director in 1976. Bothwell has been a Director of Bison since 1966 (A36).

History of the Consent Judgment

On July 10, 1974, a Consent Judgment had been entered in the United States District Court for the Southern District of New York which resolved a certain injunction action brought by the SEC against Javelin, Wismer and Doyle. A prior Consent Decree had issued out of the same court in 1958 in another action brought by the SEC. When the second injunction action was commenced, Javelin, in the interests of undertaking an effective program to prevent or minimize recurrences of problems with that agency, and to minimize the possibilities of Securities violations, agreed to establish a Compliance Committee, an Information Officer, and a special independent outside counsel to the Committee (A28). Forty percent of the Javelin Board of Directors and a majority of the members of the Compliance Committee were to be independent members,

meeting special requirements set forth in the Consent Decree. All information by or relating to Javelin was required to be first approved by the Information Officer, the Compliance Committee and Special Counsel before dissemination. The function of Special Counsel was to "review the dissemination of all information to the public by Javelin or any of its subsidiaries... to take all reasonable steps to secure Javelin's compliance with the United States Securities laws". He was to notify the SEC and Javelin's Board of Directors of any respects in which he believed the Judgment was not being carried out and to advise Javelin's Board as to the steps necessary to cure such failure (A28). The attorney named as Special Counsel was to be satisfactory to the SEC (A28).

The complaint of the SEC in that action had been, inter alia, that Wismer and Doyle had improperly disseminated information to the U.S. public. To ensure that Javelin not be prejudiced by any future acts of Wismer and Doyle, and that it could be in a position to control them, they were required to submit to and comply with the elaborate program involving Compliance Committee, Information Officer and Special Counsel.

Accordingly, Javelin, Wismer and Doyle simultaneously executed and filed with the court mutual and reciprocal stipulations as a precondition to the entry of the July 17, 1974 Consent Judgment (A14-24). The Wismer stipulation provided, under penalty of contempt:

"Wismer shall not, directly or indirectly, file materially false and misleading annual and other periodic reports required to be filed with plaintiff Commission pursuant to Sections 13 (a) and (b) and 15 (d) of the Exchange Act relating to the securities of Javelin or any of its subsidiaries or affiliates".

The stipulation further provided in Paragraph V:

"Wismer shall not engage in the dissemination of information to the public without the specific prior approval and at the direction of Javelin's standing compliance committee and the Special Counsel to said committee (all as described in Item IV of the Judgment of Permanent Injunction Against Canadian Javelin Limited and Stipulation and Consent with Respect Thereto entered into this date) and he shall fully cooperate with and inform the compliance committee of the Board of Directors and its Special Counsel and shall make available to the committee all material information available to him as soon as reasonably possible; and he shall report to the Commission on a periodic basis all of his transactions in the securities of Javelin or any of its subsidiaries".

The Contempt

On or about February 21, 1977, Wismer and his group sent into the United States to shareholders of Bison a letter bearing that date. They made not the slightest effort to comply with the provisions of the Wismer stipulation or the Consent Judgment which is referred to therein. They totally bypassed the Compliance Committee and Special Counsel. Together with their letter was a notice of shareholders meeting signed by Wismer and an information circular and proxy for a Bison meeting.

The material so sent into the United States made numerous allegations concerning Javelin, and requested Bison shareholders to vote for the Wismer slate of Directors rather than the Javelin slate, on the grounds that Javelin management had mishandled certain projects and Bison during the time in question. It omitted to show that Wismer had been the President and Director of Javelin during that time and was closely related to those very projects and alleged losses during the same period (A31). The material so sent advised the Bison shareholders that Javelin held 61.2% of Bison's outstanding shares (A40-54) which indisputably

constituted it a subsidiary of Javelin. However, by the time the Wismer letter had been sent, Wismer had contrived to have the Bison Board issue more than three million shares of Bison's stock to another affiliate controlled by the Wismer group, thus, if effective, reducing the Javelin holdings to some 34.5% of those shares and transforming Bison from a subsidiary to an affiliate of Javelin. This most material fact was omitted from the literature sent into the United States. Upon this basis of misinformation about Javelin, Bison shareholders were solicited by the Wismer group to vote at the Bison shareholders' meeting.

When Javelin's Information Officer learnt of the mailing of this material into the United States, he notified Special Counsel, as required by the Judgment. Special Counsel, in turn, confirmed that the dissemination of this material had not been submitted to the Compliance Committee for prior approval and had not been sent at the Committee's direction, and was therefore in violation of the Consent Judgment. His efforts to discuss the matter with counsel for the Wismer group met with rebuff (A62-3).

As a result of the Bison shareholders meeting, held pursuant to the proxy solicitation by the Wismer group, the Wismer slate was returned to office. Thus, by an act of self-dealing legerdemain in having the Wismer-controlled Bison Board issue substantially all its unissued shares (in exchange for those of another Wismer-controlled company, Dominion Jubilee) and then using the misleading mailing into the United States in violation of the consent decree as a means of procuring stockholder sanction to this transaction, the Wismer group effectively seized control of Bison from Javelin, depriving it as well of its preemptive position in relation to the theretofore unissued stock of that company.

The Proceedings Below

Upon the first of two hearings held on the contempt motion, no minutes were taken. The SEC's counsel, although in the courtroom, advised the Court that he had been directed to file no appearance and to take no position. The Court thereupon instructed him to file an appearance, adjourned the motion one week, and directed the SEC to take a position (A154). Upon the adjourned day, minutes of the argument were taken and are contained in the Appendix. The SEC still

took no position on the merits, instead invoking the purely technical argument of claimed lack of standing which had been invoked by the individual appellees (A126). The minutes of the second argument show that the Court led up to its decision denying contempt with a series of questions. Following these, it stated that in its view Javelin lacked standing to complain that the Consent Judgment had been violated by Wismer, et als. Essentially, that conclusion flowed in sequence but as a non-sequitur from the undeniably crucial fact that, admittedly, John C. Doyle, Javelin's principal shareholder, has for years been known to be a fugitive from the United States. The colloquy reads as follows: (A178)

"THE COURT: Is the Commission's assertion that the controlling party here, Doyle, is a fugitive, correct? Is it correct?

MR. GOLOMB: He is a fugitive and there is no doubt about it, and that has been asserted in Javelin papers for years. But he is not responsible for this motion, your Honor.

THE COURT: Is it also correct that he would not submit to the jurisdiction here?

MR. GOLOMB: That is exactly correct -- not here; the jurisdiction of the other action. It is a situation to which I am not privy. I don't represent him. And I make no apologia for him.

THE COURT: Do you think it lies in his mouth to come in here and say somebody violated this decree?

MR. GOLOMB: He is not here today, your Honor.

THE COURT: He is in another guise.

MR. GOLOMB: He was served with these papers. He is taking no position, like the SEC.

THE COURT: All right.

MR. LILLIE: Your Honor, excuse me?

THE COURT: No. I have heard enough. I deny the motion. You have no standing. I see no need to get into further questions at this time."

The Court's order below recites, as the only grounds for its decision, lack of standing. However, the transcript clearly demonstrates the erroneous and ill-founded evolution of that decision and the misapplication against Javelin of some violation of the "clean hands" doctrine or estoppel, attributing to Javelin the wholly unrelated sins of Doyle rather than truly finding lack of standing on the part of Javelin.

Prior Proceedings Herein

The docket shows that, on December 19, 1975, Judge McMahon directed that, since the Decree herein was entered on consent of Javelin, it "must therefore defend the Decree against collateral attack in the Canadian court", where an action attacking that Decree had been instituted by one Harold W. M. Smith against Javelin, the SEC and Special Counsel. He ordered Javelin to appoint counsel to appear and defend on behalf of Javelin "to protect the subject matter of this case" notwithstanding that Special Counsel, a defendant in that suit, was fully capable of defending it. Smith was then a Director of Javelin and is one of the alleged contemnors in the Wismer group herein.

In striking contrast to its holding that Javelin was required to defend the Decree against the Smith attack, for which the District Court must certainly have deemed Javelin to have standing, that Court has now ruled upon the contempt motion herein that Javelin lacks standing to complain of violations of the Decree by the Wismer-Smith group.

The SEC has advised the Court of Appeals that it is not planning to participate in this appeal. Accordingly, it

has sent no representative to attend the pre-argument conference. The SEC has further advised the Court that its counsel are of the opinion that there is no reason for the SEC to express any view at this time concerning the issues involved.

With the SEC taking no position, the only parties to this appeal are Javelin as appellant and Wismer and his group as appellees.

ARGUMENT

POINT I

APPELLANT JAVELIN HAS STANDING TO
BRING CONTEMPT PROCEEDINGS TO ENFORCE
THE CONSENT DECREE

Javelin's standing derives from and is supported by an extraordinary combination of factors including but not limited to: the mutual and reciprocal stipulations between it and Appellee Wismer; the fact that it was a party to the consent decree; the fact that the decree was entered into for the benefit of Javelin and its shareholders; the precedent of the prior order below which directed Javelin to defend the decree against the Smith attack; and that, in the face of the "blatant violation" of the decree, as found by Judge McMahon, the SEC has, to the date of this writing, not acted.

If there were no decree at all herein it could scarcely be argued that Javelin lacked standing to enforce Wismer's stipulation, entered into while he was Javelin's president, for its benefit and as assurance against future securities violations for which it might be held vicariously accountable. The doctrine that such mutual stipulations are

enforceable contracts needs no elaboration. The enforceability of the stipulations is not diminished merely because the consent decree was entered on the basis of these stipulations. The stipulations were the foundation of the decree, which could never have been entered in their absence.

As a party to the decree, Javelin has a clear interest in avoiding violations thereof, for which, as a parent corporation, it could be held liable. When such violation is utilized to diminish Javelin's (and its stockholders') position in a subsidiary and reduce the latter to the status of an affiliate, Javelin's damage is even more clearly demonstrated.

In December, 1975, Judge McMahon ruled that because Javelin was a party to the decree and consented thereto, it was required to defend it against attack by Respondent-Appellee Smith. He then directed Javelin to appoint special counsel to so defend it.

The implicit foundation of that ruling, without which it would have been unthinkable, can only be that Javelin had standing to defend the decree. The true parties for whose benefit the decree was entered were the stockholders of

Javelin. Schoenbaum v. Firstbrook, 405 F. 2d 200, 405 F. 2d 215 (en banc 2nd Cir.1968).

The parties to the contempt proceeding - except Bothwell and Wylie - were the parties, or privy to the parties to the December 1975 proceedings. Thus, Smith, Shirriff and Ayre, now alleged contemnors, were then directors of Javelin. Wismer was then its president. Continuing now to be bound by Judge McMahon's order they cannot be heard to assert that Javelin lacks standing to defend the identical decree which, so recently, it was mandated by the court to do. The December, 1975 order and ruling clearly demonstrate the error of the order appealed from.

In Terminal R. R. Assoc. v. U. S. 226 US 17 (1924), one group of party defendants had brought a contempt application against another group of defendants to enforce rights under the decree which had been entered after a suit by the U. S. for violation of the Sherman Act. The decree entered involved the fixing of rates and tariffs. The court ruled that contempt could not be granted because the Interstate Commerce Commission was required to set rates before claims could be made that the decree was violated. The significance of this ruling in the case at Bar is that the court did not hold that the moving group of party defendants lacks standing

to move for contempt, but determined the matter on other grounds. Implicitly, the moving defendants were therefore held to have standing.

In the case at Bar, appellant Javelin was a party defendant whose interest in the enforcement of the decree is abundantly clear. As a public corporation, it is charged with compliance with the Securities Laws, for which it is accountable to its shareholders. The circumstances of the execution of the stipulations and entry of a judgment emphasize Javelin's interest. The need to contain and control acts such as those of Wismer, complained of herein, was foreseeable. The stipulations and judgment, with its safeguards, were intended to avoid violations. If Javelin were to be held to lack standing to redress violations, the safeguards would be reduced to meaningless routines.

In U.S. v. ASCAP, 341F.2d 1003 (1965, 2d Cir.), cited by the court below, this Court pointed out that Metromedia, who had moved to hold ASCAP in contempt for failure to set license fees as required by a consent decree, lacked standing to move for contempt because it was not a party to the action and could not have intervened as of right. That case is therefore readily

distinguishable from the instant, in which Javelin, moving for contempt, was a party to the action and vitally interested therein.

In Shenandoah Valley Broadcasting et al. v. ASCAP, 375 U.S. 39 (1963), petitioner moved to compel the issuance of a license under a decree to which it was not a party. The District Court found, at 208 F. Supp. 896, that ASCAP was not required to issue the type of license sought and dismissed the application, without, however, holding that the petitioner lacked standing, although it only claimed to be a beneficiary under the decree, not a party. The Court of Appeals dismissed the appeal on the ground that it should have been routed to the Supreme Court (317 F. 2d 90). The Supreme Court remanded to the Court of Appeals for a decision on the merits. What is significant is that none of these decisions was predicated on lack of standing of the petitioner, notwithstanding that it was not a party to the consent decree.

It may be expected that appellees will cite SEC v. Vickers, Christy & Co., [1964-1966 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 91, 487 (S.D.N.Y. 1965), in which Judge McLean, after noting that the petitioners, moving

for contempt, were not parties to the action, issued the pure dictum that even if they were, they would have no standing to institute contempt proceedings for violation of the order and injunction in that matter. The Vickers, Christy case did not reach the appellate level. The dictum is, of course, not necessary to the decision. We submit that it does not represent the law, particularly as applicable to the fact situation in the case at bar.

The cases which deny the right to enforce a decree for lack of standing are concerned with the undesirability of permitting strangers to a decree the right to enter the picture for enforcement purposes. The obvious need to avoid voluminous litigation which motivates that reasoning is here absent.

The 1974 decree imposes upon Javelin substantial and onerous duties with which it must comply. Certainly, a party with the duty to perform under a decree must be deemed to have standing to defend the decree against those who by violating it, could impose liability and damage. The possibility of violation of the decree by directors of Javelin is not controllable by Javelin unless it has the potential to discipline violations and police the decree.

40% of the directors of Javelin Board are, pursuant to the decree, independent directors, not subject to the control of the management, which would, further, be chargeable with their wrongdoings.

To deny Javelin under these circumstances the right to move for contempt is to render useless the institutions set up by the Consent decree and to transform the Compliance Committee, the Information officer and the Special Counsel into exercises in futility.

The District Court visited upon appellant Javelin the unrelated sins of its principal shareholder, upon which it predicated its holding of lack of standing.

The colloquy at the argument below unmistakably shows that the court found that defendant Doyle was present in the proceeding in another guise. The argument concluded upon a note which undeniably penalized Javelin for the acts of Doyle. Since the court had already made the finding that the decree had been blatantly violated, the challenge by the court to Javelin's right to complain can only be predicated upon the erroneous supposition, unfounded in the Record, that the two, Doyle and Javelin, are identical.

POINT II

APPELLEE WISMER SHOULD NOT BE PERMITTED TO INSULATE HIMSELF FROM THE INJUNCTION PROVISIONS OF THE DECREE

Wismer argued below that he did not violate the injunction because, after the preparation of the letter to Bison shareholders, but before its distribution into the United States, Bison had ceased to be a subsidiary of Javelin, and had become an affiliate. This transformation, such as it purported to be, was accomplished by a transparent act of self-dealing, not denied in the opposing papers below. Wismer, acting on behalf of both Bison and Dominion Jubilee, arranged an exchange of shares, reducing greatly the percentage of Javelin's interest in Bison. With this, he contended, acts of Bison as an affiliate of Javelin were no longer subject to the decree, as they were when it was a subsidiary.

This specious argument ignores both the fundament that one should not be rewarded for his own wrong-doing as well as the fact that Wismer, by his own stipulations, was personally duty-bound to refrain from distributing any material into the United States concerning Javelin, without prior consent of the Compliance Committee and Special Counsel.

The Wismer representation to stockholders was that Bison was a subsidiary. It was that upon which they must be presumed to have relied. The applicability to Wismer and the group in privity with him of the consent decree is indisputable.

CONCLUSION

THE ORDER APPEALED FROM SHOULD BE REVERSED
AND THE CASE REMANDED TO THE DISTRICT COURT
FOR FURTHER PROCEEDINGS

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and
John K. Warsaw,
of Counsel

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss..

Robert Salant, being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 149 Tehama St.

That on the 9 day of AUGUST, 1977,
deponent personally served the within BRIEF OF
DEFENDANT-PETITIONER-APPELLANT CANADIAN JAVELW LTD.
upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

By leaving 2 true copies of same with a duly
authorized person at their designated office.

~~By depositing true copies of same enclosed
in a postpaid properly addressed wrapper, in the post office
or official depository under the exclusive care and custody
of the United States post office department within the State
of New York.~~

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses.

SHEARMAN & STERLING
Attorneys for Defendant-Respondent-Appellee
53 Wall Street
New York, N. Y. 10005

Robert Salant

Sworn to before me this

9th

day of

August, 1977

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Queens County
Commission Expires March 30, 1979

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss .

RICHARD WITHERS, being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 1526 Webster Ave. Apt. B-3
Bronx, NY 10457.

That on the 9 day of AUGUST, 1977,
deponent personally served the within BRIEF OF
DEFENDANT-PETITIONER-APPELLANT CANADIAN JAVELIN LIMITED
upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
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Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses.

MICHAEL F. PERLIS
and
JON D. JENSVOLD
Attorneys for Plaintiff-Appellee
500 North Capitol Street
Washington, D. C. 20549

Richard Withers

Sworn to before me this

9th day of August, 1977

Michael DeSantis
MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Queens County
Commission Expires March 30, 1979